

*United States Court of Appeals
for the Second Circuit*



**BRIEF FOR
APPELLANT**

76-7426

In The

United States Court of Appeals

For The Second Circuit

RAYMOND G. LASKY, NICHOLS ZACHARY, HAROLD HOWARD, CLAYTON FISHBURN, RICHARD HARLAND, AND THE PRE-TRIAL DETAINEES,

Plaintiffs-Appellees.

-against-

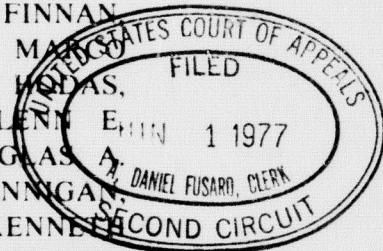
SHERIFF LAWRENCE QUINLAN,

Defendant-Appellant.

-and-

SERGEANT FARMER, JAILERS BOYCE, A. SMITH, CALLUAN, THE COUNTY OF DUTCHESS, EDWARD C. SCHUELER, Individually And As the County Executive Of Dutchess County, STANLEY T. WARYAS, LOUIS FOERSCHLER, PAUL E. PFUETZE, JEAN C. MURPHY, LOUIS A. DEBIASE, ROBERT ROBAR, JOSEPH V. POILLUCCI, JOHN ARMSTRONG, G. DONALD FINNAN, JUDITH BLEAKLEY, ROCCO T. DIGILIO, MARC CAVIGLIA, ARNOLD L. BARATTA, ROSALIE HOLDAS, JACK I. DEXTER, CHARLES MILLER, GLENN E. WARREN, CLIFFORD S. McMULLEN, DOUGLAS A. McHOUL, ROBERT HORTON, DANIEL J. HANNIGAN, JOSEPH J. LOMBARDI, GORDON WRIGHT, KENNETH UTTER, RICHARD H. WYMAN, MARGARET G. FETTES, RALPH VINCHIARELLO, WILLIAM E. BARTLETT, CLYDE R. CHASE, LUCILLE P. PATTISON, ASHEIGH M. LOSEE AND CALVIN R. SMITH, Each Individually And As Members of The Dutchess County Legislature.

Defendants.



BRIEF FOR DEFENDANT-APPELLANT

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x
RAYMOND G. LASKY, et al.,

Plaintiffs-Appellees,

-against-

SHERIFF LAWRENCE QUINLAN, et al.,

Defendant-Appellant.

-----x

BRIEF FOR APPELLANT

PRELIMINARY STATEMENT

The order being appealed from was issued by the Hon. Henry F. Werker, Judge of the United States District Court for the Southern District of New York, cited at 419 F. Supp. 799.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Issue #1: Was the County of Dutchess a necessary and indispensable party to the entry and effectuation of the July, 1973 order, so as to deprive the District Court below of the power to enter said order in the absence of the county as a party defendant?

The Court below held that the District Court was not such a necessary or indispensable party.

Issue #2: Was the award of counsel fees in this case punitive rather than compensatory and thus not authorized by Rule 14(a)

of the local and rules?

The Court below held the award authorized by Local Rule 14(a).

Issue #3: Were the findings of fact by the learned Court below supported by the record?

The Court below impliedly held that they were.

Issue #4: Was the Court below in excess of its jurisdiction in entering the 1973 order?

The Court below impliedly held that it was not.

Issue #5: Was Sheriff Quinlan immune from the imposition of an award of attorney's fees under local Rule 14?

The Court below impliedly held that he was not.

Issue #6: Is local Rule 14, to the extent that it allows the award of attorney's fees, an authorized and proper deviation from the American rule prohibiting the award of such fees in civil matters.

The Court impliedly held that it is.

STATEMENT OF THE CASE

Nature of the case

This case is an appeal of an order finding the defendant-appellant Quinlan in contempt of an order of the District Court below approving a stipulation entered into by the parties here-to for the general and specific improvement of conditions at

the Dutchess County Jail, and of a judgment awarding attorney fees and expenses to plaintiff-appellees for the period extending from August 1, 1973 to July 19, 1976.

Course of Proceedings and Disposition in the Court below.

This action was commenced in April, 1973, by certain inmates at the Dutchess County Jail. Plaintiffs were assigned counsel on June 19, 1973, and a stipulation was entered into by the plaintiffs and defendant Quinlan, Sheriff of Dutchess County, on July 25, 1973, for the improvement of conditions at the jail. This stipulation was approved by an order of the Court below on July 30, 1973. Plaintiffs-appellees filed a contempt motion on December 8, 1975, and a hearing was held on that motion of February 3, 4, 5 and 6, 1976. The District Court issued an opinion June 22, 1976, finding the Sheriff in contempt of the July, 1973 order, and awarding attorney fees and expenses to plaintiffs-appellees. On September 8, 1976, a hearing was held on the issue of attorney fees and expenses, and the Court below issued an order approving attorney fees in the amount of Thirty-Five Thousand (\$35,000.00) Dollars, and expenses in the amount of Nine Thousand Five Hundred Seventy-Three and 48/100 (\$9,573.48) Dollars. These fees and expenses were awarded for the period extending from August 1, 1973 to July 19, 1976. On October 28, 1976, the Court,

on its own motion, ordered that the Dutchess County legislature, and County Executive of Dutchess County be added to this action as party defendants (Transcript of hearing, October 28, 1976, p. 83) (282a).*

Statement of Facts

The defendant, Sheriff Quinlan, is the duly elected Sheriff of Dutchess County and, as such, is responsible for managing the Dutchess County Jail. After entering into the July, 1973 stipulation, the Sheriff made the necessary efforts to bring the jail into compliance with the stipulation. However, the Sheriff has been in partial violation of the stipulation because the antiquated and small facilities of the Dutchess County Jail cannot conform in all areas to the requirements of the stipulation without renovations to the existing jail and new additions and buildings. Accordingly, the Sheriff applied repeatedly to the County Legislature for funds ~~needed~~ to make necessary changes in the jail, but was either repeatedly turned down completely or the amount was cut back (Transcript of hearing, February 3, 4, 5 and 6, 1976, pp. 630, 631, 633, 645, 646, 667, 671, 672, 674, 698-700, 737). The Two Million (\$2,000,000.00) Dollar bond proposal for an addition and renovations to the jail,

* Unless otherwise stated page #'s in parentheses are to the appendix.

which Sheriff Quinlan instigated, was defeated by the County legislature (Ibid. p. 693). Despite these and other efforts by the Sheriff to comply with the July, 1973 order, the Sheriff was held in contempt in the June, 1976 opinion of the District Court below (110a).

Following the hearings on the contempt motion and plaintiffs' motion for attorneys' fees and expenses, the Court, on October 28, 1976, on its own motion, named as party defendants the County Legislature and County Executive of Dutchess County. Thereafter, an administrator was appointed to manage the jail, and the Sheriff's duties with respect to jail management were transferred to this administrator.

ARGUMENTPOINT I

THE COUNTY OF DUTCHESS WAS A NECESSARY AND DISPENSABLE PARTY TO THE PROCEEDINGS ARISING OUT OF APPELLEES' 1973 COMPLAINT, AND THEREFORE THE DISTRICT COURT SHOULD HAVE REFUSED TO ENTER THE 1973 ORDER IN THE ABSENCE OF THE COUNTY AS A PARTY DEFENDANT. ACCORDINGLY, THIS COURT SHOULD VACATE THE CONTEMPT CITATION AGAINST THE APPELLANT ALONG WITH THE AWARD TO APPELLEES OF ATTORNEYS' FEES AND EXPENSES.

The 1973 order entered by the District Court failed to include a necessary and indispensable party, Dutchess County (hereinafter "the County"). Appellant (hereinafter "the Sheriff" or "Sheriff Quinlan") was ordered by the Court to perform numerous remedial acts, many of which he was incapable of performing and most of which, to be performed, would require significant funding and activity by the County (Eg. Trans. Feb. '76 Hearings, pp. 40, 43, 91, 118, 257, 288, 354, 358, 395-6, 397, 515, 525, 550, 607, 608, 609, 617, 618, 672, 674, 734, 737, 752). Consequently, the County was a necessary party to the entry and effectuation of any such order and should have been made a party to the proceedings. In the absence of the County as a party defendant, the District Court below should not have permitted the entry of the 1973 order, of which the Sheriff was held in contempt.

Accordingly, the District Court erred on July 7, 1976, by holding Sheriff Quinlan in contempt of the 1973 order. The proper procedure should have been to join the County in these proceedings and enter a suitably modified order which would then have given the Sheriff and the County an opportunity to comply with a proper mandate.

It is respectfully noted at this point that on October 28, 1976, the District Court ordered that the County Legislature and County Executive of Dutchess County be added to this action as defendants, notwithstanding objections by the attorney for the County. This joinder, which was made on the Court's own motion, accords with the Sheriff's initial representation that the County's presence was necessary to afford full relief.

A. The County is a Necessary and Indispensable Person Which Should Have Been Joined by the Court Below.

Whether a person is necessary to a just adjudication of a controversy is governed by Rule 19, Fed. R. Civ. P., which provides:

"(a) Persons to be joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the Court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an

interest relating to the subject of the action and is so situated that the disposition of the action in his absences may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the Court shall order that he be made a party...".

Rule 19(b) provides criteria, with respect to a person described by Rule 19(a) who cannot be joined or whose joinder would deprive the Court of jurisdiction, for determining whether such person's presence is so important as to be regarded as indispensable, thus requiring dismissal of the entire action.

"(b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a) (1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder."

An "indispensable" party must also satisfy the requirements of Rule 19(a).

1. The County is a Person Who Would be Affected by any Relief Granted and Whose Presence is Necessary to Grant Complete Relief Among the Parties.

It is the general rule that an indispensable party is one who not only has an interest in the controversy, but an interest of such nature that a final decree cannot be rendered as between other claimants of interest who are parties without affecting that interest or leaving the controversy in such condition that its final determination may be wholly inconsistent with equity and good conscience. Reid v. Reid, 269 F.2d 923 (10th Ar., 1959). Thus, the determination of indispensability of parties is dependent not upon the nature of the decision attached, but on the ability and authority of the defendant before the Court to effectuate the relief sought by the plaintiff, Chan Wing Cheung v. Haggerty, 192 F. Supp. 452 (D. Rhode Is., 1961).

Courts have routinely held that an officer or body which must authorize appropriation of funds or otherwise exercise its authority in order for a defendant-official to take an action is indispensable (and therefore necessary) to a proceeding seeking to compel the defendant to take such action.

E.g., Coughlin v. Ryder, 341 F. 2d 291 (3 Cir. 1965); Carpenters' District Council v. N.L.R.B., 3 F.R. Serv. 2d 19A.1, case 13 (E.D. Mich. 1960).

In Thaxton v. Vaughan, 321 F.2d 474 (4 Cir. 1963), plaintiffs brought an action against city officials of Lynchburg, Virginia to enjoin inter alia segregation in the use of the Lynchburg City Armory. The City Manager and the City Council, not named defendants, had control over the armory when it was not being utilized by the National Guard (321 F.2d at 477). After plaintiffs declined to bring in additional defendants, the lower Court refused to grant relief. The Court of Appeals affirmed, stating (321 F.2d at 477-478):

"We are of the opinion that these parties [city manager and councilmen] fall, at the least, within the scope of Rule 19(b) as 'persons who ***ought to be parties if complete relief is to be accorded between those already parties***.' As he has no authority to act alone, a decree entered solely against the City Mayor would not have the effect of granting complete or even effective relief to the plaintiffs. The relief requested by the plaintiffs could not possibly be granted effectively in other appropriate defendants, and a court, particularly in an equity action, ought not grant relief against a public official unless its order will be effective. [citations omitted] (Accord. First State Life Ins. Investors Inc. v. Twentieth Century Corp., 309 F. Supp. 1930 (D. Del. 1969); Dombrowski v. Burbank, 358 F. 2d 821 (D.C. Cir. 1966) (dismissal where injunction, if granted, might be ineffec-

tive against a congressional subcommittee)."

Similarly, absent persons who would be compelled to expend funds or to take other actions have been held to be indispensable (and therefore necessary) persons in order to protect their own interests. In United Publishing & Printing Corp. v. Horan, 268 F. Supp. 948 (D. Conn. 1967), plaintiff brought an action against various officials of federal and local urban renewal and development agencies for a relocation allowance. The Court first dismissed the action as to the federal officials, due to improper service of process. The Court then concluded that the federal officials were indispensable, requiring dismissal of the entire action (268 F. Supp. at 950):

"If the action is resolved favorably to the plaintiff, a judgment will affect both local and federal administrations. Under the pertinent statutory scheme, relocation payments by the local agency are recoverable in full from the federal agency Therefore, since a plaintiff's judgment will expend itself on the government treasury and the local defendants alone, are unable to effectuate the relief sought, the federal agencies are indispensable parties to this action. [citations omitted]"

The principles of these authorities are fully applicable where the absent person is an official or body of a local government (7 Wright & Miller, Federal Practice and Procedure,

Section 1617 p. 181 (1972 ed.)):

"Cities and local governments are affected by Rule 19 in the same way as states, except that they are not protected by the Eleventh Amendment. Their joinder will be required when they will be affected by the action or adequate relief cannot be awarded in their absence...".

These authorities demonstrate that joinder of a person is required pursuant to Rule 19 if such person's absence will effectively prevent plaintiffs from obtaining full relief from named defendants or will prejudice the absent person by compelling him to take affirmative action, such as the expenditure of funds.

Both factors permeate the present case. The Sheriff has been demonstrably unable to obtain the legislative support and substantial funding essential to accomplish the substantive reforms required by the 1973 order (Trans. Feb. '76 Hearing, pp. 630, 631, 633, 645, 646, 661, 662, 663, 667, 671, 672, 674, 683, 693, 695, 698, 700 and 737). This is due solely to the absence from these proceedings of the County, and is concretely demonstrated by the repeated denial by the Dutchess County Legislature of requests by Sheriff Quinlan for funds needed to make the necessary changes in the jail to comply with the July 1973 order (Transcript of Hearing, February 3, 4, 5, 6, 1976, pp. 607, 630, 631, 633, 638, 645, 646, 662,

663, 667, 671, 672, 674, 693, 698-700, 737). Similarly, to the extent that the lower Court sought to extend its mandate to the County, it did so without providing to the County an opportunity to be heard. Compare Cobb v. Aytch, 539 F.2d 297, 201 (3 Cir. 1976):

"[W]e believe that it was impermissible for the district court to approve the consent judgment in its present form over the Superintendent's objections... The effect of the consent judgment is to nullify the Superintendent's exercise of discretion with respect to an entire class of prisoners which the Deputy Commissioner has agreed, in advance, not to approve for transfer. We do not believe that the Commissioner was authorized to agree to, and the court to approve, such a limitation on the statutory discretion of the Superintendent over his objection.

"We stress that we deal with the power of the Commissioner to enter into this consent decree over the objection of the Superintendent. We, of course, express no opinion as to the merits of the complaint."

Both factors required the County's presence before the Court.

Rule 19, Fed. R. Civ. P.

The relationship between the Sheriff and the County is quite analogous to that of a subordinate and superior government official. It is undoubtedly true that the Sheriff is responsible for the care and custody of the prisoners confined at his County jail [N.Y. Corrections Law, Sec. 500-C (McKinney 1972)]; nevertheless, the Sheriff has neither the authority

nor ability to collect or expend County funds for the purpose of effectuating his responsibility with respect to the County jail and the inmate confined therein [N.Y. County Law, Art. 17, (McKinney's, 1972)]. In fact, New York State places the duty to maintain a jail facility on each of the several counties within the state [New York County Law, Sec. 217 (McKinney's, 1972)]. Thus, the Sheriff is dependent upon and must rely on County officials for all funding necessary for personnel [N.Y. County Law, Sec. 652 (McKinney's, 1972)], equipment and supplies, maintenance, and of course, physical plant alterations or renovations [N.Y. County Law, Art. 7, Secs. 353, 362(3), (McKinney's, 1972)]. Such funding is therefore the result of a budgetary process within the authority and control of local County officials other than the Sheriff or anyone under his control [N.Y. County Law, Secs. 354, 355 and 360; also Art. 17 generally (McKinney's, 1972)]. Thus, with respect to the allocation and expenditure of funds for the purpose of maintaining the County jail, the Sheriff is clearly a subordinate official to those County officers having the responsibility and control of the budgetary process.

The general rule, concerning the indispensability of such a superior official is that he is an indispensable party if the decree granting the relief sought will require him to

take action, whether by exercising directly a power lodged in him, or by having a subordinate exercise it for him. Thus, in Williams v. Tanning, 332 U.S. 490, 68 S. Ct. 188, 92 L. Ed. 295, (1947) the test as to whether a superior official can be dispensed with as a party was stated by the Supreme Court to be whether "The decree which is entered will effectively grant the relief desired by expending itself on the subordinate official who is before the court". (332 U.S. at p. 494, 68 S. Ct. at p. 189.)

This test was followed in Hynes v. Grimes Parking Co., 337 U.S. 86, 69 S. Ct. 968, 93 L. Ed. 1231 (1949), where the Court noted:

"Such is the precise situation here. Nothing is required of the Secretary [i.e., the alleged indispensable party]; he does not have to perform any act, either directly or indirectly. Respondents merely seek an injunction restraining petitioner from interfering with their fishing. No affirmative action is required of petitioner, and if he and his subordinates cease their interference, respondents have been accorded all the relief which they seek. The issues of the instant suit can be settled by a decree between the parties without having the Secretary of the Interior as a party to the litigation." 337 S at 97; 69 S. Ct. at 976.

Further, in Ceballos v. Shaughnessy, 352 U.S. 599, 77 S. Ct. 545, 1 L. Ed. 2 583 (1957), the Supreme Court noted that the resolution of the issue also depends on the ability

and authority of the defendant before the Court to effectuate the relief which is sought. See also State of Colorado v. Toll, 268 U.S. 228, 45 S. Ct. 505, 69 L. Ed. 927 (1925). Thus, if the Court having jurisdiction over the subordinate can grant effective relief without requiring any act by the superior, then the superior is not indispensable (Leber v. Canal Zone Central Labor Union, *supra*). Indeed, the authority and ability of the subordinate to provide the relief requested has been regarded as the "crucial test" of indispensability in such cases, Estrada v. Ahrens, 296 F.2d 690 (5th C.R., 1961); see also Houthorne v. United States Department of Interior, 160 F. Supp. 417 (E.D. Pa., 1958).

Applying these principles to the case at bar, it is respectfully submitted that the substance of the 1973 order (and the July 25, 1973 stipulation embodied in the order), of which the Sheriff was held in contempt, and the opinion of the Court below, clearly demonstrate and at least impliedly recognize the indispensability of the County as a party defendant.

By providing for the supply of items of personal hygiene, proper health and exercise area, services of a notary public, and substantial alterations and repairs to the physical plant of the jail facility, the stipulation on its face requires

the approval and support of the County of Dutchess and the County Legislature of Dutchess County in the form of budgetary allocations and allowances for such items. Further, the District Court's opinion cites the lack of trained personnel and lack of experience of the jail staff in certain areas of the jail maintenance. This necessarily compels a finding that to improve such conditions requires the hiring and subsequent training of competent persons, which the Sheriff has no ability to do without the County's approval and support, in that he has no ability to expend funds unless appropriated by the County of Dutchess [New York County Law, Sec. 652 (McKinney's, 1972)]. Further, the Court's ruling with respect to Sgt. Farmer and the other defendants that they have no effective control over what transpires in the County jail, and therefore should not be held in contempt, is equally applicable to the Sheriff who has no authority or control over the allocation of monies necessary for the implementation of the July 25, 1973 stipulation. This is evidenced by the repeated attempts of the Sheriff to secure necessary funds for the implementation of this stipulation which were unsuccessful, as noted above.

Finally, it is respectfully noted that the court, in its opinion holding Sheriff Quinlan in contempt, held that the

County was not a necessary party to this action. This opinion, dated June 21, 1976, was modified by the Court's own motion to include the County Legislature and County Executive of the County of Dutchess as party defendants in this action (order to show cause dated October 19, 1976) (198a). Thereafter, the Court ordered that the County Legislature and County Executive of Dutchess County be added as party defendants to this action, "and the purpose for it is of course to have complete control of the situation to see that things are done" (Transcript of Hearing, October 28, 1976, p. 83) (282a). It is also respectfully noted that the Court, in the October 28th hearing, stated that:

"I feel that you [the County Legislature and County Executive of Dutchess County] are necessary parties. In order to fashion any relief, that is going to be--to in some way establish these minimal constitutional rights for these individuals in the jail, you are a party." (Ibid, p. 79)

B. The County Was Not Bound by the 1973 Order.

The inmates may contend that the County did not have to be joined because it would be bound by any order or judgment entered against the Sheriff and because the Sheriff was represented in 1973 by the County Attorney. Such a contention would be erroneous.

The scope of an injunction issued by a Federal Court is

controlled by Rule 65(d), Fed. R. Civ. P., which provides:

"Every order granting an injunction
...is binding only upon the parties
to the action...and upon those persons
in active concert or participation with
them who receive actual notice of the
order by personal service or otherwise."

A person whose interest conflicts with that of a party
cannot be "in active concert or participation" with such party.

As stated by the Court in Wright v. County School Board of
Greenville, Co., Va., 309 F. Supp. 671, 677 (E.D. Va. 1970):

"In general, only those acting in concert
with, or aiding or abetting, a party can
be held in contempt for violating a court
order. One whose interest is independent
of that of a party and who is not availed
of as a mere device for circumventing a
decree is not subject to such sanctions,
[citation omitted]."

The facts of this case demonstrate that appellant and the
County were not in concert. The County has steadfastly refused
to provide the funding and other assistance sought by the Sheriff
for implementation of the improvements mandated by the 1973
order. After Sheriff Quinlan had urged that the County be added
as a party and after the inmates had so moved, the County vigor-
ously opposed such joinder. To conclude that the County shared
a common interest with the Sheriff or in any way viewed itself
as bound by the 1973 order would flaunt reality.

Finally, as a matter of New York State Law, a County is

not responsible for, or in concert with, a County Sheriff.

The State Constitution so provides (McKinney's Const. Article 13, Section 13):

"[T]he County shall never be made responsible for the acts of the sheriff."

In Edwards v. Onondaga County, 39 Misc. 2d 443, 240 N.Y.S. 2d 789 (S. Ct., Cayuga Co. 1963), the Court held that a complaint that a County Sheriff and his agents failed properly to supervise a cell block in which an incarcerated infant suffered repeated assaults and batteries did not state a cause of action against the County.

There is no basis for a conclusion that the 1973 order was effective against the County. Such a result requires that the County first be properly before the Court.

C. Recent "Prisoners' Rights" Decision do Not Lead to a Contrary Result.

The inmates may contend that the relief which they sought in their 1973 complaint is similar to relief sought by plaintiffs in numerous "prisoners' rights" actions. We are mindful that federal Courts have handed down numerous decisions, particularly within the last seven years, which have compelled state authorities to assure that detention facilities meet constitutionally minimal standards. (E.g., Detainees of Brooklyn H. of Det. for Men v. Malcolm, 520 F. 2d 393 (2 Cir. 1975);

Gates v. Collier, 501 F. 2d 1291 (5 Cir. 1974); Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970).) Such decisions have uniformly held that shortage of funds is not an excuse for denying detainees their constitutional rights. E.g., Pugh v. Locke, 406 F. Supp. 318, 330-331 (M.D. Ala. 1976) and cases cited therein.

However, these authorities uniformly state that the alternative to constitutionally-acceptable prison facilities is the closing of deficient facilities and the release of detainees. The point of such authorities is that the excuse of shortage of funds will not prevent a Court from ordering the shutdown of prison facilities.

Thus, in Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), in which the Court had before it the members of the Arkansas State Board of Corrections and the State Commissioner of Corrections (309 F. Supp. at 364), the Court ordered those defendants to improve the state's prison system, concluding (309 F. Supp. at 385):

"[T]he obligation of the Respondents to eliminate existing unconstitutionalities does not depend upon what the Legislature may do, or upon what the Governor may do, or, indeed, upon what Respondents may actually be able to accomplish. If Arkansas is going to operate a Penitentiary System, it is going to have to be a system that is countenanced by the Constitution of the United States." (emphasis supplied)

The clear import was that the Court would order the prisons shut down for non-compliance. There is no implication that respondents would be held personally liable for the State legislature's failure to provide funding.

In Detainees of Brooklyn H. of Det. for Men v. Malcolm, 520 F. 2d 392 (2nd Cir. 1975), this Court reached the same conclusion, (520 F. 2d at 399):

"Inadequate resources or finances can never be an excuse for depriving detainees of their constitutional rights. [citations omitted] On the other hand, as the above authorities indicate, this Court is hardly in the position to order the City to raise the necessary funds to build additional facilities. We can, however, order the release of persons held under conditions which deprive them of rights guaranteed by the Constitution unless the conditions are corrected within a reasonable time."

To the same effect are Pugh v. Locke, 406 F. Supp. 318, 331 (M.D. Ala. 1976); Hamilton v. Love, 328 F. Supp. 1182, 1194 (E.D. Ark. 1971). Consequently, these decisions have nothing to do with the direct punishment of a subordinate official, such as appellant, who is unable to comply with a Court's remedial order.

Underlying these authorities is a general acceptance that questions of prison conditions and reform are better left for legislative resolution. Consequently, Courts have traditionally

kept hands off such questions. E.g., Prounier v. Martinez, 416 U.S. 396, 404-405 (1974).

This Court, while ordering relief where appropriate, has recognized the logic of Prounier. In Rhem v. Malcolm, 507, 333, 340-341 (2 Cir. 1974), the Court stated:

"[W]e believe that the order should be framed to close the prison to detainees or to limit its use for detainees to certain narrow functions by a fixed date, unless specified standards are met...ultimate effect of such a remedial scheme may not differ much from that used by Judge Lasker. It has the crucial practical advantage, however, of not putting the judge in the difficult position of trying to enforce a direct order to the City to raise and allocate large sums of money, see Prounier v. Martinez...steps traditionally left to appropriate executive and legislative bodies responsible to the voters." (Citations and footnotes omitted)

The Court in Rhem quoted from Hamilton v. Love, 328 F. Supp. 1182, 1194 (E.D. Ark. 1971) and Jones v. Wittenberg, 330 F. Supp. 707 (N.D. Ohio 1971) aff'd sub nom Jones v. Metzger, 456 F. 2d 854 (6 Cir. 1972):

"[I]n order to build a new jail, the public must provide additional funds. This Court has no power whatsoever to require the public to do so. Under our system of government, the ultimate source of power, is the people. The people have not given this Court any taxing power, or any control over their use of the taxing power...[T]his Court will not attempt to exercise a power that it does not and should not have...".

These authorities make plain that the Court below erred. The Court could have halted violations of prisoners' rights by preventing the Sheriff and the County from operating the County jail. But the Court should not have punished Sheriff Quinlan personally for failing to effectuate a program of reform for which he lacked the funds and related support from the County.

In a recent "prisoners rights" decision, the Fifth Circuit Court of Appeals, in a 2-1 decision, ordered the Director of Florida's Division of Corrections to take remedial action with respect to the State's prisons, which would necessarily require appropriation and expenditure of substantial funds. Costello v. Wainwright, 525 F. 2d 1239 (5 Cir. 1976). In a strong dissent, Judge Roney argued the impropriety of the result, in effect arguing the indispensability of the State to an order granting full relief (525 F. 2d at 1253-1254):

"The order in this case requires a result that the defendant cannot possibly achieve and still comply with the Florida law which limits his authority...

"The district court and the majority opinion have overlooked a very basic reality about this case. The State of Florida is not a defendant. The Parole and Probation Commission is not a defendant. The Governor is not a defendant. Nor are any of the 'other agencies of the State of Florida' parties to this suit...There is nothing in this record to indicate that the defendant Wainwright, who is

the only party who can be held in contempt for non-compliance, has any way to legally meet the broad scope of the order...

* * *

"Wainwright should not be required to suffer the consequences of an order with which he has no legal capacity to comply, absent an injunction by a three-judge court against the operation of the statutes which would make his compliance illegal. The case should be remanded to permit the district court to grant only such relief against this defendant as he can provide without nullification of state statutes, to convene a three-judge court if that is deemed appropriate under the circumstances, and to permit, if proper, the joinder of other defendants whose activity is to be modified if the result sought by the district court order is to be achieved."

On March 3, 1976, the Fifth Circuit Court of Appeals granted a rehearing en banc in Costello, 528 F. 2d 1381 (5 Cir. 1976).

The Court, after rehearing en banc, adopted Judge Roney's position and vacated its earlier opinion. Costello v. Wainwright, 539 F. 2d 547 (5 Cir. 1976). Although Judge Roney's decision rested in part on the necessity of invoking a three-judge Court, Judge Roney also stated (539 F. 2d at 549):

"[T]he en banc court now decided that the Order entered by the district court requires a result that the only two defendants in this lawsuit cannot possibly achieve through their own actions and still comply with the Florida law which limits their authority. The Court therefore vacates the Order and remands the case to the district court to

decide precisely what the defendants in this suit can legally do to alleviate the constitutional violations found to exist in the Florida prison system, and then to fashion an Order with which these defendants can comply without violating any Florida laws." (footnote omitted)

The authorities are in accord with respect to the permissible scope of relief against a subordinate official such as appellant. To the extent that the lower Court desired to mandate affirmative action to remedy conditions at the Dutchess County Jail, the County was an indispensable party to such proceedings. The Court should have joined the County and should not have punished appellant for failing to comply with an order which should not have been entered and with which he was powerless to comply.

D. The issue of the County's Indispensability may properly be considered by this Court.

The absence of an indispensable party can be raised at any time and is never waived. 3A Moore, Federal Procedure, Section 19.19, pp. 2581-2582 (2d ed. 1974); State Farm Mut. Auto. Ins. Co. v. Mid-Continent Gas. Co., 518 F. 2d 292, 294 (10 Cir. 1975); McShan v. Sherrill, 283 F. 2d 462, 464 (9 Cir. 1960) (indispensability can be considered for the first time by an Appellate Court, even on its own motion). Also, Boles v. Greenville Housing Authority, 468 F. 2d 476 (6th Cir. 1972).

This Court has frequently endorsed the view that absence of an indispensable party is not waived even though not presented in the answer or by motion prior to the answer. E.g., Agrashell, Inc. v. Composition Materials Co., 40 F.R.D. 295, 397 (S.D.N.Y. 1966); Sweetwater Rug Corp., v. J. & C. Bedspread Co., 198 F. Supp. 941, 943 (S.D.N.Y. 1961), aff'd, 299 F. 2d 573 (2 Cir. 1962). The absence of an indispensable party may be raised at any time, even by the reviewing Court on its own motion (Clark v. Hutchinson, 161 F. Supp. 35 (D.C. Canal Zone, 1957)).

Applying these authorities to our facts, it is sufficient to permit appellant to raise the joinder issue in this Court if the County is a necessary party. Further, the fact that the Sheriff consented to entry of the 1973 order cannot lead to a contrary result for at least two reasons. First, the District Court itself should have declined to endorse the order unless it joined the County at that time or received assurance that the County would consider itself bound by the order. In the absence of either condition, the District Court itself erred by not dismissing for want of a necessary and indispensable party. Second, the Sheriff in 1973 was represented by the County attorney. It was improper for the County attorney to counsel the Sheriff to agree to the 1973 order in view of the

obvious conflict between the Sheriff's consent to the order and the County's contrary interests. At the October 28, 1976 hearing before the District Court, the County vigorously opposed its inclusion as a party in these proceedings. If the County was and is unwilling to be bound by, and share the burdens of, the 1973 order, then it would be fundamentally unfair to burden the Sheriff with an order into which he was led by the County attorney.

In the contempt proceeding, commenced in December, 1975, Sheriff Quinlan retained his own counsel, independent of the County. Counsel asserted to the District Court from the outset that the Sheriff was willing to attempt to reach a workable solution to the problems underlying the 1973 order, but that the County must be a party to such a solution if it was to be workable.

E. The Indispensability of the County as a party defendant renders the 1973 Order improper and invalid and therefore the Contempt finding must be vacated.

The absence of an indispensable party results not in an absence of jurisdiction, but still should cause a dismissal based on the notion of fundamental fairness implicit in our system of jurisprudence American Optical Company v. Curtis, 59 F.R.D. 644 (S.D.N.Y. 1973).

Thus, in Terrebonne Land Development Corp. v. Superior

Oil Co., 65 F.R.D. 375 (E.D. La., 1974), it is noted that

"Indispensability is not however, a matter of jurisdiction in the strict sense of the term. It is more accurately a consideration so crucial to equity that dismissal is in order if, for whatever reason, an indispensable party cannot be joined. The thesis that a suit should be dismissed because an indispensable interest is not party to it is based on the concept that the court lacks power to enter effective relief in the absence of such an interest." 65 F.R.D. 375 at 377.

Faced with the absence of an indispensable party, it is therefore manifest that the Court below should not have permitted the entry of the 1973 order without the joinder of the County as a party defendant, which could have (and has been) accomplished by the Court on its own motion.

Because the contempt citation resulted from an erroneously issued order, the contempt should be vacated. Although in a criminal contempt proceeding the validity of the underlying order is not open to question, in a civil contempt proceeding a contempt finding must fall with the order if the order is held to have been erroneously or wrongfully issued. This Court has so held in Heyman v. Kline, 456 F. 2d 123, 131 (2 Cir. 1972):

"In our view, the injunction was erroneously issued, see infra, and since, unlike convictions for criminal contempt, judgments of civil contempt fall when the order underlying them is vacated, the civil contempt must be reversed. (citations omitted)"

To the same effect is Rosenstiel v. Rosenstiel, 278 F. Supp. 794, 802 (S.D.N.Y. 1967).

Because the 1973 order should be vacated for failure to join an indispensable party, the contempt citation must fall with it, along with the award to the inmates of attorneys' fees. Further, the award of attorneys' fees itself underscores the impropriety of the contempt citation. If the award was against appellant in his individual capacity, it is an unfair penalty imposed on appellant for violating an order with which he was powerless to comply. It is unreasonable and unjust to hold in contempt a defendant who was powerless to comply with an order. E.g., Natural Resources Defense Council, Inc. v. Train, 510 F. 2d 692 (D.C. Cir. 1974), and it is certainly unreasonable and unjust to hold such a defendant personally liable for the payment of \$45,000 in plaintiffs' attorneys' fees.

If the award was against the Sheriff in his official capacity, then the County, which should itself bear such expense, has been deprived of the opportunity to assert to the Court the County's position. Even if the Court permits the 1973 order to stand and directs the lower Court to supervise compliance nunc pro tunc by the Sheriff and the County, the Sheriff should not be penalized for the period of time during which he was unable to comply. Natural Resources Defense Council, Inc. v. Train, supra.

CONCLUSION

This Court should conclude that the County was a necessary and indispensable party to the proceedings arising out of the inmates 1973 complaint, and that the District Court lacked power to enter the 1973 order in the absence of the County as a party defendant. Accordingly, the Court should vacate the contempt citation against Sheriff Quinlan along with the award to the inmates of attorneys' fees.

The Court should vacate the 1973 order and remand this action to the District Court for further proceedings against Sheriff Quinlan and the County. Alternatively, the Court should direct the District Court to modify the 1973 order to require appropriate remedial action by the Sheriff and the County, consistent with the controlling authorities.

POINT II

THE AWARD OF COUNSEL FEES IN THIS CASE
IS PUNITIVE AND NOT MERELY COMPENSATORY
AND THUS WAS NOT AUTHORIZED BY RULE 14(a)
OF THE LOCAL CIVIL RULES.

A. The Award of Counsel Fees was Apparently Computed Upon
the Duration of the Alleged or Perceived Contempt Rather
Than Upon the Duration of the "Contempt Proceeding" and
Hence Was Made Contrary to the Authority of Rule 14(a).

The plaintiffs-appellees moved in the District Court below for an award of counsel's fees and expenses, purportedly pursuant to Rule 14(a) of the Local Civil Rules of the United States District Court for the Southern and Eastern Districts of New York. That Rule provides that reasonable counsel fees may be included as an item of damage if such fees are "... necessitated by the contempt proceeding..." (emphasis supplied).

The application sought attorneys fees for a period commencing August 1, 1973--two days after the order which was the subject of the contempt motion. The affidavit in support of the motion and the proof at hearing were concerned with the period commencing August 1, 1973. The decision and order awarded counsel's fees for the entire period commencing August 1, 1973. And yet the uncontradicted evidence from plaintiffs-prisoners' own attorney demonstrates that a "contempt proceeding" did not start until a date considerably

later than August 1, 1973 (Levin's affidavit, July 20, 1976), (133a).

Counsel for plaintiffs-prisoners did not begin working on contempt papers until March 19, 1974 and then only as an adjunct to other business, i.e., his efforts to secure compliance (Levin affidavit, July 20, 1976,) (133a). It was apparently not until late 1974 and early 1975 that counsel for plaintiffs-prisoners began "activities directed to gathering evidence in support of a contempt motion" (Levin affidavit, July 20, 1976, p.4), (136a). It was not until October 14, 1975 that any step was taken by counsel for plaintiffs-prisoners toward a contempt "proceeding" (Levin's affidavit, July 20, 1976, p. 6) (138a). And no contempt "proceeding" was actually brought until December 8, 1975 (Affidavit of Levin, July 20, 1976, p. 7), (139a).

Although Rule 14(a) is designed to be compensatory and not punitive, the award of counsel's fees on the facts of this case has a punitive effect and the Rule should therefore be strictly construed. A "proceeding" connotes some formal Court activity. It is submitted that for the purposes of Rule 14(a) there was no "contempt proceeding" until the filing of a motion for contempt on December 8, 1975 and the

Court was without authority to award counsel's fees for the period prior thereto.

Even if the Rule is not read literally to require a formal "proceeding", it is submitted that it must at least be read to require that the efforts of counsel for which reimbursement is sought have been directed toward the initiation of such a proceeding. Counsel for plaintiffs-prisoners seems to recognize that fact, for he does point out to the Court below that portion of his time expended as of the date of his conference with the Hon. Henry F. Werker on October 14, 1975 for the purpose of discussing the projected motion for contempt (Levin affidavit, July 20, 1976, p. 6), (138a).

Counsel for plaintiffs-prisoners seems, though, to have based his claim for compensation upon the theory that the Sheriff was in contempt of the Court's order from August 1, 1973 and that, therefore, the right to counsel's fees should run from that date (Levin affidavit, July 20, 1976, p. 10, para. 30), (142a). The Court seems to have adopted that theory (Memorandum Decis. of Judger Werker, October 8, 1976, pp. 1-3 (195a); Judgment and Order of Judge Werker, December 22, 1976), (290a).

It is submitted that that theory is erroneously applied on two grounds. First, there was no determination that the

defendant-sheriff was in contempt the entire period commencing August 1, 1973. The only finding was that he was in contempt as of July 19, 1976. Second, if Sheriff Quinlan had been found to be in contempt as of August 1, 1973, there would be no right ipso facto to attorney's fees for that period. Plaintiffs would be entitled only to attorney's fees if such were necessitated by a contempt proceeding during that period.

But the record shows that the possibility of a contempt proceeding was apparently not even conceived until sometime in 1974 (Levin affidavit, July 20, 1976, p. 10), (142a) and did not gain the status of a "proceeding" at least until sometime late in 1975 (Levin affidavit, July 20, 1976, pp. 6-8), (138a-140a). The plaintiffs wholly failed to show, for instance, that their counsel's efforts from August 1 to December 31, 1973 were directed toward a "contempt proceeding". In fact the affidavit of plaintiffs-prisoners' counsel shows, to the contrary, that his efforts were directed toward securing compliance through other than a contempt proceeding, and toward curing other problems ad hoc as they arose (Levin affidavit, July 20, 1976, pp. 2-3), (134a-135a). Judge Werker, in his memorandum decision recognized that the approach of Mr. Levin and his assistants was to seek compliance by entreaty and patience--commencing with his appointment in June of 1973.

Seeking compliance by entreaty is not, it is submitted, the same as preparing for, or prosecuting, a "contempt proceeding".

To base the computation of an award of counsel's fees upon the alleged or perceived period of contempt rather than the actual period of prosecution of the contempt proceeding is to make the award a punitive rather than a compensatory remedy. That is clearly in violation of Rule 14(a) and unauthorized.

B. The Award of Counsel's Fees Clearly Includes the Payment for Efforts Other Than Those Directed at Prosecuting the Contempt Proceeding. To that Extent, the Award is Punitive, in Violation of Rule 14(a) and Unauthorized.

Closely related to the preceding point is the point that, irrespective of when a "contempt proceeding" for purposes of Rule 14(a) began, it is clear that the "contempt proceeding" was interspersed with efforts by counsel for plaintiffs-prisoners that were directed at object other than that contempt proceeding. Mr. Levin's own affidavit recites that his efforts in 1973 and 1974 were directed at securing compliance, not at prosecuting a contempt proceeding (Levin affidavit, July 20, 1976, pp. 2-3), (134a-135a). It recites frequent communications with the Dutchess County Attorney in an effort to secure compliance. It recites communications with the inmates in an effort to help them deal with problems at the jail. It recites communications with the County Legislature

to make them aware of the jail problems. It recites work with the State Commission of Corrections "...as a sensible and efficient method of achieving compliance". (Ibid, p. 4, (136a). It recites "...efforts to secure compliance without resort to costly and time consuming litigation.". It recites further contacts with, and an appearance before, the County Legislature. It recites the preparation of a "Draft proposal for the Dutchess County Jail" at the request of a Dutchess County Legislator. It recites that these activities continued through late 1974 and early 1975 (Levin affidavit, July 20, 1976, p. 4), (136a). It also recites numerous attendances at State Commission of Correction and State Senate hearings concerned with directly or indirectly related jail matters. And apparently all of these actions were included in the computation of counsel's fees. (E.g., transcript, September 8, 1976, p. 9--comment of Judge Werker (160a); p. 11--comment of Levin) (162a).

All of these activities by Mr. Levin were commendable and doubtless they served to improve jail conditions somewhat. However, they were not activities "necessitated by the contempt proceeding" and hence compensation therefore is not recoverable under Rule 14(a).

Plaintiffs-prisoners failed to show which of the activities of their counsel were necessitated by the contempt proceeding. In fact by that counsel's own admission, he could not distinguish which of his efforts were directed toward the county, which toward the County Legislature, and which toward the defendant-sheriff's counsel (Trans., September 8, 1976, pp. 11-12 comments of Levin), (162a-163a). It is clear that plaintiffs-prisoners cannot recover as damages counsel's fees for efforts other than those necessitated by the contempt proceeding (Local Civil Rule 14; Krentler-Arnold Hinge Last Co. v. Leman, 50 F.2d 699, rev'd in part on other grounds 284 U.S. 448). To compute the award on other than those efforts necessitated by the contempt proceeding is to make the award punitive rather than compensatory.

C. The Purpose of Rule 14(a) is to Compensate the Plaintiffs in Damages and Make Them Whole. The Award of Counsel's Fees in this Case in No Way Affects the Plaintiffs-Prisoners, is a Windfall to Plaintiffs' Counsel and a Punishment to Defendant-Sheriff.

Plaintiffs-prisoners initiated the complaint in this case pro se. Plaintiffs-prisoners' counsel, Mr. Levin, accepted assignment to the case as a service to the Court and the bar. Plaintiffs-prisoners' counsel never anticipated payment for attorney's fees and expenses (Levin affidavit, July 20, 1976,

pp. 10-11), (142a-143a). Logically, then, plaintiffs-prisoners incurred no monetary obligation to their counsel when their counsel brought contempt proceedings. Having incurred no monetary obligation the plaintiffs-prisoners incurred no legal damages for which they could be made whole, and no award in damages could be made under Rule 14(a).

Plaintiffs' counsel, Mr. Levin, however, received a windfall he "never expected". Therefore, the award not only fails to be compensation to the plaintiffs-prisoners, but it fails to be "compensation" to the attorney. It is a gift to the extent that the plaintiffs-prisoners are not obligated to pay.

Finally, the award is punitive with respect to the defendant-sheriff. His legal obligation under Rule 14(a) is to recompense the plaintiffs-prisoners for damages suffered by the plaintiffs-prisoners by virtue of the contempt. The defendant-sheriff owes no obligation to plaintiffs-prisoners' attorney and has no obligation in damages to make him whole. To the extent that the defendant-sheriff is required to do so he is being punished rather than being required to make whole the intended beneficiary of the Rule--the plaintiffs-prisoners.

D. The Award of Counsel's Fees Pursuant to Rule 14(b) was Punitive and Unconscionable in that the District Court Ignored the Defendant-Sheriff's Ability to Pay the Same.

A civil contempt proceeding is not designed to vindicate the Court's authority but to recompense a party for the lost cause by the failure of the other party to observe the Court's Order. Universal Athletic Sales Co. v. Salkeld, 511 F.2d 904. Here the award of Thirty-Five Thousand Dollars (\$35,000.00) in counsel's fees, exclusive of costs, without regard to the defendant-sheriff's ability to pay was clearly a punitive and vindictive measure.

Refusing to receive evidence of the defendant's financial condition resulted in the imposition of an award which will bankrupt the defendant (Quinlan's affidavit, 145a). The defendant-sheriff has been placed in the position where it is impossible for him to pay the award and therefore he may never be able to purge himself of the contempt. The very purpose of the contempt proceeding will have been thwarted if the award is permitted to stand. In exercising its discretion in fixing a fee for the plaintiffs' attorney, the Court should have exerted care to see that the contempt proceeding was not diverted to vindicate its authority and to benefit the plaintiffs-prisoners' attorney to the disregard of the financial

ability of the contemnor to pay the fee. The record demonstrates that the Court failed to exercise that degree of care.

CONCLUSION

This Court should conclude that the award of counsel's fees and expenses by the District Court below was punitive and not merely compensatory and thus was not authorized by Rule 14(a) of the Local Civil Rules. Accordingly, the Court should vacate and set aside the award of counsel's fees and expenses. Alternatively, should the Court conclude that the award of counsel's fees and expenses includes a payment for efforts other than those directed to prosecuting the contempt proceeding, this Court should vacate and set aside said award and remand the matter to the District Court below for further proceedings to determine the appropriate amount of counsel's fees and expenses that may be awarded under said Rule 14(a).

POINT III

THE FINDINGS OF FACT BY THE LEARNED COURT BELOW ARE CONTRARY TO THE RECORD AND WITHOUT BASIS IN FACT.

The record does show instances where the stipulation and order were not complied with. But said noncompliance was primarily in areas where it was impossible to comply and thus failure must be excused. In no event does the record display a willful failure to comply, and by the terms of Judge Gurfein's order, that was to be the test (J. Gurfein's order dated July 30, 1973; 80a). Nowhere in the record have the plaintiffs sustained their burden of showing with clear and convincing proof a willful contempt on the part of the Sheriff.

A. The test here must be "Was the Sheriff's contempt, if any, willful?"

The defendant, Sheriff Lawrence M. Quinlan, urges that this Court take the position that a finding of willful failure to comply with Judge Gurfein's order is a condition precedent to a finding of contempt. Sheriff Quinlan bases his position on the following language from Judge Gurrein's order:

"The action is dismissed upon the stipulation being filed, subject to reopening or the institution of contempt proceedings in the event of a willful failure to comply with the aforementioned order of the Court." (emphasis supplied)

The Sheriff urges that there are two rules of law that support his position that willful failure to comply with Judge Gurfein's order is required in order to find him in contempt.

1. Res Judicata

The plaintiffs failed to take a timely appeal from Judge Gurfein's order rendered on July 30, 1973. The plaintiffs, therefore, under the doctrine of res judicata are barred from securing review of Judge Gurfein's order in this proceeding, or on appeal, Class v. Norton, 505 F.2d 123 (2nd Cir. 1974).

As the plaintiffs have allowed the time for direct appeal of Judge Gurfein's July 30, 1973 order to expire, they may not relitigate the central issue of that order, namely that contempt proceedings can be instituted by plaintiffs in the event of a willful failure to comply with the Court's order; Oriel v. Russell, 278 U.S. 358 (1929); National Labor Relations Board v. Local 282, International Brotherhood of Teamsters, 428 F.2d 994 (2nd Cir. 1970).

2. Law of the Case

It is generally held that neither a court of concurrent jurisdiction, nor the same judge, nor different judges, are inexorably bound by its or his own precedent but there certainly is an interest in establishing a uniformity of treatment. Unless

clearly convinced that harm might be done by not affording flexibility, the law of the case shall govern (Moore's Federal Practice, Vol. 1B, 2nd Ed., p.401).

The doctrine of law of the case is addressed to the Court's good sense. One consideration in the application of the law of the case doctrine is the unseemliness of courts' altering legal rulings as to the litigants, Perma Research & Development Co. v. Singer Company, 308 F.Supp 743 (D.C.N.Y. 1970).

The record does not disclose why Judge Gurfein limited a reopening to a case of "willful contempt" but we cannot presume he did so in error. In fact, we should presume it was deliberate, as a result of bargaining between the parties or a self-generated desire to keep the federal Courts out of nit-picking questions of compliance.

Presumably, Judge Gurfein was cognizant of the fact that the Sheriff, as a constitutional officer of the State of New York, had no independent treasury upon which to draw. Additionally, the provisions of the July 25, 1973 stipulation quite evidently require funds for implementation. It is, therefore, reasonable to assume that the requirement of willful failure to comply with the Court's order was deliberately inserted by the Judge as a condition precedent to the institution of any contempt proceeding. Where litigants have once battled for the Court's

decision they should neither be required, nor without good reason permitted, to battle for it again.

B. The burden here is upon the plaintiff inmates to show willful contempt with clear and convincing proof.

The burden on a petitioner seeking a citation for a civil contempt is a heavy one and proof of the violation must be clear and convincing with a bare preponderance of the evidence not sufficient; Oriel v. Russell, 278 U.S. 358, 362 (1929); Stringfellow v. Haines, 309 F.2d 910, 912 (2nd Cir. 1962). Here, the inmates have shown areas of non-compliance with the stipulation and order, but that is not, ipso facto, clear and convincing proof of contempt; and it certainly does not amount to clear and convincing proof of willful contempt.

C. The record reveals only good faith attempts to comply with the order and thus willfulness is negated.

Nowhere does the record reveal obdurate or contumacious conduct by the Sheriff. The record does reveal that the Sheriff was led unwittingly into a stipulation with which he could not possibly fully comply (e.g., Trans., Feb. 1976 hearing, pp. 525-8, 532, 762). He did not see the stipulation which is the basis of this entire action or have knowledge of its contents until after it was signed (Trans., Feb. 1976 hearing, pp. 668-9). That is true despite the fact that it contained detailed and esoteric requirements with respect to jail operations (See

stipulation 27a).

The Assistant County Attorney made and signed the stipulation in New York City while the Sheriff was not even present (Trans., Feb. 1976 hearing, pp. 668-9). And it was apparently the position of the County Attorney's Office that they were representing the County primarily and the Sheriff only indirectly (Trans., Feb. 1976 hearing, p. 651). And yet, the County was not bound by the stipulation -- only the Sheriff.

At first that situation did not disturb the Sheriff because he felt the County, in good faith, would join with him and give him the financing necessary to comply (Trans., Feb. 1976 hearing, pp. 680-2). But it soon developed that the County, not being bound, was not going to be bothered. Repeated requests and efforts to secure help from the County legislature in complying were fruitless (Trans., Feb. 1976 hearing, pp. 630, 631, 633, 645, 646, 661, 662, 663, 667, 671, 672, 674, 683, 693, 695, 698-700, 737).

Despite these difficulties and despite the fact that the Sheriff is head of a department with many responsibilities in addition to operating a jail (e.g., civil process, law enforcement and civil defense) the Sheriff devoted considerable personal effort toward complying with the order -- and in fact, achieved significant improvements in jail operations. In addition to his

personal efforts the Sheriff made numerous changes in administrative, medical and kitchen staff in an effort to achieve compliance. Even testimony of the inmates witnesses establish that considerable strides were made.

Set out below is an indexed capsulization of the Sheriff's attempt at and achievements in complying with Judge Gurfein's order (page references are to the Transcript of the February 1976 hearing on the contempt motion):

- 19..... Sheriff Quinlan made a request for transfer of inmates to other facilities in order to comply with classification.
- 23..... Areas were established for ill inmates or inmates in need of supervision.
- 24-25.. The inspector observed that there was provision made for constant supervision of inmates in need thereof.
- 29..... The inspector observed that there had been painting of the facility.
- 39..... The inspector observed that there was an effort being made to paint the showers.
- 45..... The inspector for the State Commission of Correction observed improvements in the cleanliness of the kitchen saws.
- 45..... The inspector observed that repairs were being made to shower facilities.
- 48..... The inspector observed improvements in the kitchen.
- 49..... A large new washer was installed at the jail for inmates and kitchen workers clothing.
- 49..... A large supply of white uniforms was made available for kitchen workers.
- 51..... The inspector for the State Commission of Correction observed an improvement in the sanitary conditions of the facility.
- 53..... The inspector observed that provision had been made for the sanitary disposal of trash.
- 54..... Mr. Ashinton, a social worker, was obtained to do social work at the jail.
- 56..... The State Commission of Correction inspector observed

that the inmate areas were being kept neater.

60..... The inspector observed that bedding was turned in by the inmates when they were leaving the facility, as required by the stipulation.

65..... Sheriff Quinlan contacted the County Mental Hygiene department regarding a psychological social worker for the jail.

82-83.. Ten jail guards were sent to the Commission of Correction Basic Training School in Lifesaving Techniques. Also, two in-service schools for lifesaving techniques were conducted at the Dutchess County Jail.

91..... The inspector observed an improvement in the cleanliness of the kitchen.

91..... The inspector observed that the kitchen pot room had been improved by painting.

91..... The inspector observed that the meat cutting equipment was kept thoroughly cleaned.

92..... The inspector observed that there was an improvement in the cleanliness of floors and shelving in the kitchen.

116.... An area was created for inmates in need of special supervision.

117.... Sheriff Quinlan made applications to the Commission of Correction for transfer of inmates in order to comply with classification.

118.... The Sheriff hired a medical officer with a background in hospital work and first-aid training from the Air Force and the hospital, and the fire company.

227-228 The medical record system at the jail was changed in compliance with the stipulation.

244.... Regulations were promulgated concerning the administering of drugs and medications to inmates.

246.... A new examining table was purchased and installed in the female quarters.

249.... Arrangements were made to send inmates to the nearby hospital emergency room in an emergency where the doctor could not be reached.

249.... In-service training in emergency procedures was conducted at the jail.

250-251 Staff meetings were conducted with respect to potential suicides and guards were instructed to keep aware of this problem.

258.... Medical officers were instructed to crush pills where feasible to avoid "storing" by inmates.

286.... A recreation area was established pursuant to the

stipulation.

304.... Mr. Vincent, Senior Administrator of the Dutchess County Jail, instituted a policy of personally handling inmate calls to attorneys, which worked well according to the inmate witness.

315.... Sheriff Quinlan in December, 1973, discussed with Dr. Redmond, Dutchess County Health Commissioner, the possibility of making regular inspections of the Dutchess County Jail.

329.... Sheriff Quinlan met with Dr. Redmond and Assistant County Attorney Steven Wing regarding implementing the recommendations of the Health Commissioner and regarding a general agreement with respect to inspections of the facility by the Health Department

329.... Sheriff Quinlan informed Dr. Redmond that he was interested in proceeding with a committee of community health experts in an effort to set up guidelines for medical care in the facility.

329.... Sheriff Quinlan and Dr. Redmond agreed there would be no problem setting up the routine inspection of the jail facility for compliance with health requirements.

330-331 A system of inspections by the County Health Department was established.

336.... Dr. Redmond denied that Health Department services were unwelcome or discouraged by the Sheriff's Department.

338.... Dr. Redmond, Commissioner of Public Health, admitted that the committee of community health experts did not perform promptly due to his own footdragging.

339.... Health Department inspections of the facility were held in August, 1975.

341.... Health Department inspections of the facility were held in January, 1976.

344.... Sanitary inspections of the facility were held in January, 1974, March, 1974, August, 1974 and January, 1975.

344.... Sheriff Quinlan agreed to Dr. Redmond's proposals for a medical experts committee.

345.... Health Department reports showed that several recommendations for correction of defects in the facility had been complied with.

345.... The Health Department inspector reported improvements in the facility.

346.... The improvements noted in the facility were ones which were not costly.

348.... The Sheriff's Department participated in a newly established

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mental health information project created by the County mental health commission to teach police how to handle and assist the mentally ill.

351-353 Sgt. Farmer of the Dutchess County Sheriff's Department initiated contacts with the Mental Health Department and set up a program of mental health services by bringing inmates to the mental health clinic upon recommendation of the jail doctor. 20 such inmates were seen in the first year.

355.... The Sheriff wrote to Mr. Bartlett, Chairman of the Public Safety Committee of the Dutchess County Legislature, requesting his assistance in gaining approval of a psychiatric social worker for the jail.

365.... The Sheriff hired Dr. Josephy as jail physician. Sick calls were increased to two times a week instead of one.

366.... Approximately 30-40 inmates were seen by Dr. Josephy at each sick call.

371.... Dr. Josephy made emergency calls to the jail and was also available by phone for emergencies.

376.... Sheriff Quinlan dismissed Dr. Josephy for delinquency in making sick calls at the jail.

377.... Kitchen workers were brought up periodically for examination by the jail doctor.

378.... Monthly examinations of kitchen workers were established.

378.... The examining room at the jail was clean and had been repainted prior to use.

381.... A blood screening program for all inmates were established at the jail.

382.... Two new examining tables were ordered for use at the jail. Syphilis screening was established at the jail.

383.... Pregnant inmates were treated by the gynecology department at nearby Vassar Hospital.

385-387 The jail doctor was consulted from time to time with respect to the adequacy of the inmates' diets.

389.... The jail doctor arranged for referrals to the mental health center for inmates requiring such.

394.... Arrangements were made with Vassar Hospital so that sub-speciality clinics would be available to prisoners, e.g., orthopedic problems, eye problems, etc.

404.... Chaplin Byrd observed that the jail administrator was always cooperative in trying to get help for inmates on any problem whenever requested.

406.... Mr. Markell, a graduate of Union College, Schenectady, a registered professional nurse, and holder of a Masters

Degree in social work from Fordham University, was hired to prepare medication for inmates under the direction of the physician.

412.... The Sheriff ordered that the medical staff would crush all medication to avoid "storing" by inmates.

416.... Mr. Peluso, a nursing instructor and a registered nurse with 40 years experience with the State of New York, was hired by Sheriff Quinlan to conduct intake interviews with inmates and prepare general medical histories.

418.... Mr. Peluso was requested by Sheriff Quinlan to teach the preparation and administration of medications to the other medical staff at the jail.

461.... Mr. Hesselbach, was hired in mid-1974 to supervise the kitchen. He had 26 years experience as mess officer and club officer in the Navy and 7-8 years experience in private hotel and restaurant business.

463.... Mr. Hesselbach established special diets for inmates requiring no pork, vegetables only, etc.

467.... Mr. Hesselbach established kitchen whites and a laundry routine for kitchen workers.

470.... A system of monthly extermination, plus an on-call extermination system were established at the kitchen.

471.... A qualified dietician from the State Hospital, the State Commission of Correction, the County Health Department, and the jail doctor were given jail menus for review and comment.

510.... Sheriff Quinlan requested Keene Jail Equipment Co. to make a proposal for renovation of the Dutchess County Jail in an effort to comply with the stipulation.

511.... Keene Jail Equipment Co. was asked to make more cells available for inmate classification.

515.... Keene presented a proposed renovation of the jail including heating and plumbing in the amount of approximately two million dollars.

523.... As a result of conversations initiated by Sheriff Quinlan in late 1973 or early 1974, Keene Jail Equipment Co. made an inspection of the jail and recommendations for its improvement.

540.... Sheriff Quinlan hired Mr. Vincent, holder of a Masters Degree from St. Lawrence University, as Senior Administrator of the Dutchess County Jail. Mr. Vincent had 38 years of corrections experience with the State and retired as Superintendant (or Warden) of the Greenhaven Prison. He was hired in July, 1975.

541.... A system of decontamination and issuance of bedding pursuant to the stipulation was established by Mr. Vincent.

545.... Phone calls on admission were allowed pursuant to the stipulation.

546.... In the event of a plumbing failure in any cell, the inmate was moved out of that cell.

546.... Adequate heat was available at the jail, but, due to the age of the system, it was difficult to control it from getting too hot.

548.... Rules and regulations were distributed to inmates upon admission and also posted in the library and on the floors of the jail. Difficulty was experienced in keeping the inmates from tearing down the rules and regulations.

548.... Sheriff Quinlan instructed Mr. Vincent to carry out the directives of the Commission of Correction as nearly as physically possible.

595.... Dr. Katz, jail dentist, expanded his treatment of inmates to include extractions, partial dentures, full dentures, root canals, crowns, jackets, and dental surgery. A regular jail dental day was established but the dentist's office was available at any time for special cases. An average of 6 or 7, and sometimes as many as 9 inmates were seen per week by the dentist.

597.... At the request of the Sheriff, the dentist began visiting at the jail in March, 1974.

597.... A dental office was established at the jail in early 1974, including dental chair, spotlight and necessary implements.

599.... The dental room was freshly painted at the time it was established in early 1974.

599.... The jail dentist saw every patient who wanted to be seen- there were no restrictions placed upon the dentist by the Sheriff.

600.... The jail dentist observed that everyone needed dental work- it is only a question of degree.

601.... Although there was no x-ray machine at the jail, the dentist was always allowed to take inmates to his office for x-ray examination if topical examination at the jail and information from the patient indicated that that was necessary.

602.... The dentist's opinion is that all inmates' dental needs were taken care of.

605.... The jail dentist went through the entire facility and examined every inmate - catching up on a backlog of dental work.

607.... A shrinking of funds by the County Legislature necessitated a termination of the dental visits at the jail but full dental services continued at the dentist's office. It was merely a matter of transporting the inmates to the office instead of seeing them at the jail.

630.... Proposals for jail renovation were discussed by the County Legislature many times since 1973.

631.... Appropriation requests by the Sheriff for the jail were discussed many times by the Legislature, including a two million dollar renovation plan initiated by the Sheriff.

633.... Sheriff Quinlan was before the Board of Legislators many times regarding the jail conditions and particularly in regard to appropriations of money for operation and improvement of the facility.

645.... Sheriff Quinlan and his attorney appeared before the committees of the Legislature asking for increased medical expenses and costs, increased salaries for jail positions and other related areas of concern in compliance with the stipulation.

655.... Rules and regulations were prepared and submitted to the State Commission of Correction and were accepted by them and distributed to inmates but were torn down as posted.

657.... Sheriff Quinlan met with Assistant County Attorney Wing and Dr. Redmond of the County Health Department to set up a committee of doctors and persons related to health care to assist the Sheriff in medical aspects of the jail.

659.... A new medical records system was established at the jail in accordance with the stipulation.

661.... Sheriff Quinlan demonstrated to the new Assistant County Attorney Steven Wing a concern over compliance with the stipulation.

662.... Sheriff Quinlan told the Assistant County Attorney, "Steve, I am really worried about this medical care. I have not got enough money for medical care. I have not got a doctor who can examine each newly admitted inmate here for $14\frac{1}{2}$ days".

662.... Sheriff Quinlan indicated that he would make application for funds from the County Legislature to cover this problem and in fact such applications were made. Sheriff Quinlan indicated that he was not confident that the Legislature will appropriate the needed money to build a new jail.

663.... Sheriff Quinlan indicated a concern that the Legislature would not give the money to rehabilitate the old jail or build a new jail to meet classification requirements. Also, that the Legislature would not give enough money to hire personnel to help comply with the stipulation.

667.... Sheriff Quinlan, a member of the Sheriff's Department since 1937 and Sheriff since 1960, applied to various committees of the Legislature for help in meeting the stipulation.

668.... Sheriff Quinlan testified that he had implemented the stipulations to the best of his ability and is not willfully defying the order.

672.... Sheriff Quinlan consulted with the Public Safety Committee with respect to funds to comply with classification. Sheriff Quinlan communicated with the County Executive and the County Planning Committee with respect to funds and plans to comply with the stipulation. Sheriff Quinlan observed that the expenditure of monies was the only way to comply with classifications requirements of the stipulation.

674.... Sheriff Quinlan sought transfer of inmates in order to comply with classification and said transfers were accomplished- but were criticized by county officials because of the tremendous expense involved.

677.... Sheriff Quinlan indicated that when he entered into the stipulation, he assumed that he would have a reasonable time to comply with the classification requirements.

680.... Sheriff Quinlan assumed, when he entered into the stipulation, that the Legislature would cooperate with him in complying with the stipulation.

682.... Sheriff Quinlan relied upon the County Attorney to present details of the stipulation and order to the Legislature as he relied upon the County Attorney in all other legal matters.

683.... Sheriff Quinlan made every effort to comply and did comply to the best of his ability.

683.... Sheriff Quinlan became concerned over his inability to comply with the stipulation and brought it to everyone's attention who could help him in county government. He also brought it to the attention of the State Commission of Correction.

685.... Sheriff Quinlan did not communicate his inability to comply to the Court personally because he assumed that the County Attorney, who was familiar with his inability, was so informing the Court since the County Attorney was the party who signed the stipulation.

688.... Sheriff Quinlan ordered and received new bedding for the facility in November, 1973.

689.... Sheriff Quinlan ordered and received printed rules and regulations for inmates in November, 1973.

693.... Sheriff Quinlan was instrumental in the preparation and presentation of a two million dollar bond issue proposal to the County Legislature.

694.... When the bond issue for renovation of the county jail was turned down, Sheriff Quinlan requested the Commission of Correction to close the county jail since he was unable to comply with the Minimum Standards and the stipulation and order.

695.... The County Board of Legislators turned down the Sheriff's proposal for a bond issue to renovate the county jail.

699.... The Sheriff had conversation with members of the County Board of Legislators, specifically the Public Safety Committee, who indicated to him that if he would withdraw his request to have the county jail closed, he would receive cooperation from the County. Upon that assurance, Sheriff Quinlan withdrew his request to close the jail.

704-706 Sheriff Quinlan gave orders that the personal hygiene stipulation be followed. Sheriff Quinlan believes that the stipulation is being followed and has no knowledge that it isn't. He had issued written orders that it be followed.

708.... Sheriff Quinlan has a rule, to be carried out by supervising officers, that laundry be done at the jail weekly and Sheriff Quinlan knows that it is done.

709.... Pursuant to the stipulation, inmates turn in their bedding materials when they leave the institution.

711.... Sheriff Quinlan's order is that pillows be cleaned and he personally wants them clean.

713.... It is the policy of the institution that inmates bathe upon admission, pursuant to the stipulation.

715.... Sheriff Quinlan has had occasion to personally observe the operation of the jail showers and has never discovered any bursts of hot water as described by an inmate.

716-717 It is the Sheriff's policy and his request that toilet articles be given out upon admission of an inmate- the basics - toothbrush, toothpaste and soap. Other toiletries must be purchased from the commissary - pursuant to the stipulation.

717.... It is the Sheriff's standing requirement that each inmate be decontaminated upon admission and the Sheriff assumes that his supervising officers see that that requirement is carried out.

714.... Shortly after the entry of the stipulation and the order, Sheriff Quinlan assembled his jail administrators and informed them of the stipulation and ordered them to see that it was complied with.

719.... Kitchen, workers are assigned to live together in dormitory style and are required by the kitchen supervisor to bathe each day.

720.... Sheriff Quinlan engaged a new doctor - Dr. Chung - in early 1976 to replace Dr. Josephy who proved unsatisfactory.

725.... Sheriff Quinlan's orders are that no one is to be confined more than 24 hours without a visit from a doctor in compliance with the law and the stipulation and order. No one has been in confinement since the summer of 1975 except for inmate Dvorcsick, and he was there at his own request to be away from other inmates and was not a "solitary confinement" case as contemplated by the 24 hour rule.

726.... Dr. Chung was hired by Sheriff Quinlan to take care of whatever medical needs there were in the facility - without limitation.

727-728 Sheriff Quinlan wrote to Public Health Commissioner Redmond voicing a concern over the enormous amount of drugs being prescribed for inmates in the facility.

731.... Changes in drug handling and medical record keeping were instituted pursuant to the stipulation.

737.... Sheriff Quinlan submitted a budget request to the County Legislature for a psychiatric social worker in July, 1975. That budget request was cut out by the Legislature.

741.... Based upon Sheriff Quinlan's personal observations and his discussions with the jail doctor, the Sheriff concluded that the jail could use a psychiatric social worker.

742.... Sheriff Quinlan acquired a volunteer social worker who came into the jail regularly until he moved away from the county.

744.... Sheriff Quinlan arranged with the County Department of Mental Hygiene to take people to the mental hygiene clinics for examinations upon recommendations of the jail doctor. The Director of the Department of Mental Hygiene resisted coming to the jail and thus it was necessary to ship inmates to the clinic.

755.... Blankets were provided to the inmates as required by the stipulation and, in fact, in extra cold weather extra blankets were provided.

758.... Sheriff Quinlan does not restrict or censor mail coming into the facility and thus it is not necessary for him to notify the inmate of such censoring. Law books were made available to inmates in the jail library, in the Sheriff's office and in the General Office library.

This activity cannot be said to reflect a willful disregard of the order of Judge Gurfein. Frustrated though he was, it is apparent that Sheriff Quinlan was making a good faith effort to comply. And a good faith effort, it is submitted, negates the possibility of willful contempt.

CONCLUSION

The findings of fact by the learned Court below are contrary to the record and without basis and fact. Any instances of noncompliance are primarily in areas where it was impossible to comply and thus failure must be excused. In no event does the record display a willful failure to comply, required by Judge Gurfein's order, and the plaintiffs have not sustained their burden of showing with clear and convincing proof a willful contempt on the part of the Sheriff.

POINT IV

THE 1973 ORDER REQUIRED VIRTUALLY A COMPLETE ASSUMPTION BY THE FEDERAL COURT BELOW OF THE RESPONSIBILITY AND AUTHORITY FOR THE DAY-TO-DAY ADMINISTRATION OF THE LOCAL COUNTY JAIL, WHICH ASSUMPTION WAS NOT WARRANTED BY THE FACTS BEFORE THE COURT AT THE TIME THIS ORDER WAS ENTERED, AND THEREFORE THE COURT EXCEEDED ITS JURISDICTION IN ENTERING THE 1973 ORDER.

It is with great reluctance that federal Courts intervene in the day-to-day operation of State and local correctional systems, Procunier v. Martinez, 416 U.S. 396, 94 S.Ct. 1800, 40 L. Ed. 2, 224 (1974); Cruz v. Beto, 405 U.S. 319, 92 S. Ct. 1079, 31 L. Ed. 263 (1972); Novak v. Beto, 453 F. 2d 661 (5th Cir. 1971); Diamond v. Thompson, 364 F. Supp. 659 (M.D. Ala., 1973). This reluctance is quite naturally grounded on the recognition of the broad discretion required for prison officials to maintain orderly and secure institutions, Procunier v. Martinez, supra, 416 U.S. at 404-05; Diamond v. Thompson, supra; Newman v. Alabama, 349 F. Supp. 278 (M.D. Ala. 1972), aff'd in part 503 F. 2d 1320 (5th Cir. 1974).

On the other hand, it is no doubt true that constitutional deprivations to prison inmates will not be countenanced by the Courts, and our federal Courts will intervene to protect incarcerated citizens from "wholesale infringements of their constitutional rights" (see Procunier v. Martinez, supra, 416

U.S. at 405-06; Johnson v. Avery, 393 U.S. 483, 89 S. Ct. 797, 21 L. Ed. 2, 718 (1969).

In the case at bar, there has been no judicial consideration or determination that any constitutional rights of the inmates have been denied or violated. Rather, the District Court below entered an order in 1973 approving and embodying a stipulation between the parties which provided generally for the implementation of improvements at the Dutchess County Jail. This stipulation, and the 1973 order embodying it, calls for vast, far-reaching, and extensive improvements in the operation, maintenance and renovation of this County Jail facility. Thus, the order immediately placed the District Court below in the position of overseer and watchdog of not only specific problem areas of the jail, but also of the day-to-day administration of the County Jail itself.

This unique position of the District Court with respect to the local jail of Dutchess County is concretely demonstrated by the Court's increasing control and supervision of the jail, evidenced by the Court's appointment of a monitor, to check compliance with the 1973 order, and thereafter an administrator to replace Sheriff Quinlan as the jail superintendent, and further the Court's encouragement to the Dutchess County Legislature to consider the imposition of a County Commission of

Correction to permanently replace the Sheriff of Dutchess County as the superintendent of the County Jail.

It is respectfully noted that none of these actions, resulting in the federal Court's assumption of the daily administration of the jail, was grounded on a finding of a deprivation of constitutional rights of any prison inmates. While it is not submitted that such assumption of a local correctional facility by a federal Court would not be warranted in any circumstances, it is submitted that before such an extensive and far-reaching assumption is permitted, there must be a satisfactorily clear determination of a violation of the inmates' constitutional rights.

Since the 1973 order necessarily required and permitted the Court to assume daily control over the County Jail, but was not based on any finding of a violation of constitutional rights, it is submitted that the entry of the order was beyond the authority and power of the District Court, and the order is jurisdictionally defective. Further, that the order was based on a stipulation between the parties should in no way cure this jurisdictional defect, and cannot be relied on to uphold such an improperly entered order.

POINT V

SHERIFF QUINLAN IS IMMUNE FROM THE IMPOSITION OF AN AWARD OF ATTORNEYS' FEES UNDER LOCAL RULE 14.

This Court is fully aware of the doctrine of immunity for public officials. A judge of this very Court wrote the landmark exposition of the reasons why such immunity must appertain [Gregoire v. Biddle, 177 F. 2d 579 (2nd Cir. 1949, J. Learned Hand), cert. denied, 339 U.S. 949 (1950)]. Without it public officials would be inhibited in performing their duties to the best of their ability. Rather, they would timidly tailor their actions in a manner designed merely to avoid lawsuits. The dual problem of inhibition and harassment of public officials outlined by Judge Learned Hand mandates immunity if the public is to be properly served by its officials. And, obviously that immunity does not disappear if the public official happened, in fact, to be wrong in his actions. Of course, there must be some recourse against public officials who improperly perform. Thus, perhaps the Dutchess County Jail could have been closed under this complaint. Or perhaps the Sheriff could have been removed from office under proper procedure. In any event, it is submitted, the Sheriff was immune from judgment in damages or in equity.

A. The Sheriff is absolutely immune as an officer of the Court.

The judiciary has traditionally been held immune from suit for acts done within their judicial authority, regardless of motivation. As the Court argued in Frazier v. Moffatt, 188 Cal. App. 2d 379, 239 P. 2d 123, 126 (1951), "to hold judicial officers personally liable for errors of judgment concerning either questions of law or fact would be subversive of both independence and efficiency in the administration of justice."

That same immunity has been extended to quasi-judicial officers and to officers of the Court [Gregoire v. Biddle, supra, at 580; Denman v. Leedy, 479 F. 2d 1097 (6th Cir. 1973); Stewart v. Minnick, 409 F. 2d 826 (9th Cir. 1969); Lucarelli v. McNair, 453 F. 2d 836 (6th Cir. 1972)].

In New York State the Sheriff is by law an officer of the Court. (N.Y. County Law, Sec. 650, McKinney's 1972). Specifically, with respect to the detaining of prisoners, his only authority to do so is upon order of the Court (N.Y. CPL Sec. 510.10, McKinney's 1971). That the Sheriff is a mere agent of the Court with respect to the operation of the County Jail is made clear by New York law which provides that if a jail becomes unsafe or unfit for any reason the County judge shall designate a facility in another County for the holding of prisoners and the Sheriff of that other County must accept and

hold prisoners pursuant to said designation (N.Y. Correction Law 505, 506 McKinney's 1968).

It is submitted, therefore, that the Sheriff is immune from tort liability and orders of equitable relief with respect to his operation of the County Jail, on the theory of judicial immunity.

B. The Sheriff is immune as an executive official acting within his discretion.

The United States Supreme Court has recognized that public officials other than the judiciary are entitled to immunity.

In Spalding v. Vilas, 161 U.S. 483, 498 (1869), the Court found absolute immunity for an executive public official:

"In exercising the functions of his office, the head of an executive department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of government, if he were subjected to any such restraint."

That position was re-affirmed in Barr v. Matteo, 360 U.S. 564 (1959). Speaking for the Court, Justice Harlan observed that such immunity was necessary, even balancing...

"on the one hand, the protection of the individual citizen against pecuniary damage caused by oppressive or malicious action on the part of officials of the Fed-

eral Government; and on the other, the protection of the public interest by shielding responsible governmental officers against the harassment and inevitable hazards of vindictive or ill-founded damage suits brought on account of action taken in the exercise of their official responsibilities."

Of course, the general rule for non-judicial officials is that they are immune from liability on discretionary acts as distinguished from purely ministerial, [Miller v. San Francisco, 187 Cal. App. 2d 480, 9 Cal. Rptr. 767 (1960)].

The Sheriff is charged by law with the duty of operating the County Jail (Correction Law 500-C). The myriad details of said operation are primarily left to his discretion-within statutory and regulatory guidelines. Even the stipulation and order in this case left the manner of accomplishing compliance up to the discretion of the Sheriff.

That the Sheriffs liability in this case is premised on a second-guessing of his exercise of discretion is apparent throughout the record. The major portion of the nearly 800 page record of the contempt hearing is concerned with such questions as:

- Should the Sheriff's orders to his subordinates be in writing or verbal?
- Should the Sheriff personally administer the jail or may he delegate to jail administrators?

- Should more room in the jail be allocated to medical facilities?
- Should the keys to the medical cabinet be left with the chief jailer at night or should possession be restricted to medical officers?
- Should the Sheriff show a copy of the stipulation and order in this case to all of his subordinates and to all County officials, etc.?
- Should the Sheriff seek extra cells at the jail by way of renovation or should he merely ship excess inmates to another facility?
- Should dentistry be done at the jail or at the dentist's office?
- Should the Department of Mental Hygiene's psychiatric social worker be used at the jail or should the Sheriff's Department hire their own?
- Should outdoor recreation go on at all seasons at the jail or only during warm weather?
- Should kitchen workers keep their kitchen clothes in their dormitory space or in the kitchen?
- Should kitchen employees shower at night or in the morning?
- Should the County Attorney or the Sheriff, personally, apply to the Court for a modification of the stipulation and order?

It is submitted that the Sheriff's liability in this case is premised on the inmate's perception that the Sheriff's choices in these and other discretionary matters were erroneous. It is submitted that this Court should not perpetuate this second-guessing, but should find the Sheriff immune from liability in this case.

C. The Sheriff is immune as a "municipal subdivision."

The underlying complaint in this action was, in part at least, in the nature of a Section 1983 action. (See complaint (6a); 42 U.S.C. Section 1983). It is well settled that municipal subdivisions are immune from civil liability under Section 1983 [Gibson v. Seattle, 472 F. 2d 1220, (19th Cir. 1972); Moore v. County of Alameda, 411 U.S. 693 (1973); Shellburne, Inc. v. New Castle County, 293 F. Supp. 237 (D.Del. 1968); Harvey v. Sadler, 331 F. 2d 387 (9th Cir. 1964)]. That immunity extends to police departments. (Smith v. Spina, 477 F. 2d 1140 (3d Cir. 1973)).

Under New York Law and the Common Law the Sheriff is the Sheriff's Department. He is a constitutional officer (NYS Constitution Article 13, Section 13) and his deputies are merely personal extensions of himself. (Flaherty v. Milliken, 193 N.Y. 564, (1908)). The Sheriff is personally liable for his acts and the acts of his deputies. (NYS Constitution Article 13, Section 13; Edwards v. Onondaga County, supra.) The Sheriff is unique among public officials in that respect, and has been treated as a governmental entity apart from the municipality in which he serves. (NYS Constitution Article 13, Section 13, Flaherty v. Milliken, 193 N.Y. 564, (1908)).

It is submitted, therefore, that the Sheriff is uniquely

immune as an individual who is, de jure, a municipal subdivision of this state.

D. The Sheriff was immune from judgment on the underlying complaint and hence is immune from judgment for attorneys' fees.

The foregoing demonstrates that on one or more theories the Sheriff was immune from tort and injunctive liability on the underlying complaint. If the purposes of said immunity are to be effectuated, it is submitted that that immunity must extend also to attorneys' fees. In a somewhat analogous case, where the District Court awarded attorneys' fees against an immune state official, the U.S. Supreme vacated the award and remanded the case. (Stanton v. Bond, 45 Law Week 3399, (Nov. 29, 1976)).

CONCLUSION

It is submitted that Sheriff Quinlan was immune from judgment on the underlying complaint on the theory that he is a judicial officer, an executive acting in discretionary matters, and, a governmental subdivision. If the purposes of official immunity are to be met, that immunity should also apply to the award of attorney fees.

POINT VI

LOCAL RULE 14, PROVIDING FOR AN AWARD OF ATTORNEY FEES AND EXPENSES NECESSITATED BY A CONTEMPT PROCEEDING, IS AN UNAUTHORIZED AND IMPROPER DEVIATION FROM THE AMERICAN RULE PROHIBITING THE AWARD OF SUCH FEES AND EXPENSES IN CIVIL MATTERS.

The Supreme Court, in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975), held that only Congress, and not the Courts, could specify which laws were important enough to merit attorney fee shifting from one litigant to another. In contrast to this Supreme Court decision, Local Rule 14 of the District Court, a judicial rather than congressional declaration, allows an award of attorney fees and expenses necessitated by any contempt proceeding. Without congressional authorization and approval, the award of attorney fees and expenses in the case at bar was beyond the authority and jurisdiction of the District Court, since there was no other congressional authorization for such an award.

Accordingly, the award of attorney fees and expenses should be reversed in its entirety.

CONCLUSION

This Court should conclude that the County was a necessary and indispensable party to the proceedings arising out of appellees' 1973 complaint, and that the District Court lacked power to enter the 1973 order in the absence of the County as a party defendant. Accordingly, the Court should vacate the contempt citation against appellant along with the award to appellees of attorney's fees.

The Court should vacate the 1973 order and remand this action to the District Court for further proceedings against appellant and the County. Alternatively, the Court should direct the District Court to modify the 1973 order to require appropriate remedial action by appellant and the County, consistent with the controlling authorities.

This Court should conclude that the award of counsel's fees and expenses by the District Court below was punitive and not merely compensatory and thus was not authorized by Rule 14(a) of the Local Civil Rules. Accordingly, the Court should vacate and set aside the award of counsel's fees and expenses. Alternatively, should the Court conclude that the award of counsel's fees and expenses includes a payment for efforts other than those directed to prosecuting the contempt

proceeding, this Court should vacate and set aside said award and remand the matter to the District Court below for further proceedings to determine the appropriate amount of counsel's fees and expenes that may be awarded under said Rule 14(a).

This Court should conclude that the finding of contempt made by the learned Court below was not supported by the record. Accordingly, this Court should reverse the decision of the Court below and vacate the finding of contempt and set aside the award of counsel fees and expenses.

This Court should conclude that the Court below exceeded its jurisdiction by assuming the responsibility and authority for the day to day administration of the Dutchess County Jail, which assumption was not warranted by the facts before the Court at the time the 1973 order was entered.

This Court should conclude that Sheriff Quinlan was a public officer immune from tort liability and injunction in the underlying complaint and therefore was immune from the imposition of an award of attorney's fees under local Rule 14. Accordingly this Court should vacate the award of attorney's fees made by the Court below.

This Court should conclude that local Rule 14 is an unauthorized assumption of the Congressional power to determine in what cases attorney's fees should be awarded. Accordingly the award of attorney's fees by the Court below should be vacated.

Respectfully submitted,

Peter R. Kehoe
Attorney for Defendant-Appellant

COURT OF APPEALS
SECOND CIRCUIT

RAYMOND G. LASKY, NICHOLAS ZACHARY
HAROLD HOWARD, CLAYTON FISHBURN,
RICHARD HARLAND, & THE PRE-TRIAL
DETAINEES,

Plaintiffs-Appellees,
- against -

SHERIFF LAWRENCE QUINLAN,

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF

ss.:

I, Reuben A. Shearer, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at 211 West 144th Street, New York, New York 10030.

That on the 22 day of May, 1977 at One Chass Manhattan Plaza
New York, N.Y.

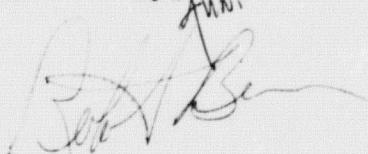
deponent served the annexed

upon
Davis Polk, & Wardell, Esqs.

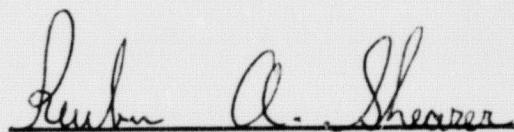
Brief

the 22 in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the John A. Shearer herein.

Sworn to before me, this 22 day of May, 1977



ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1978



Reuben A. Shearer